19600 SERVICE DATE - LATE RELEASE APRIL 15, 1998
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SURFACE TRANSPORTATION BOARD[1]

DECISION

Finance Docket No. 32425

CHICAGO SOUTHSHORE & SOUTH BEND RAILROAD—OPERATION EXEMPTION—ILLINOIS INTERNATIONAL PORT DISTRICT

Decided: April 9, 1998

A notice of exemption under 49 CFR 1150.31 was served and published at 60 FR 8251 on February 13, 1995, for Chicago SouthShore & South Bend Railroad (CSS) to operate a "nonexclusive" switching service for the Illinois International Port District (Port), a noncarrier, on Port-owned track (Port track) generally north of 130th Street and east of Doty Avenue on the west bank of Lake Calumet in Chicago, IL.[2] CSS simultaneously filed a petition to dismiss the notice of exemption.

Chicago Rail Link (CRL) filed a petition to revoke the notice of exemption, or, in the alternative, to revoke it in part to reflect the narrow scope of the switching service CSS was

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (ICCTA), enacted December 29, 1995, and effective January 1, 1996, abolished the Interstate Commerce Commission (ICC or Commission) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 10901 and 11323. Therefore, this decision applies the law in effect prior to ICCTA, and citations are to the former sections of the statute, unless otherwise indicated.

[2] A related notice of exemption under 49 CFR 1180.2(d)(7) was served and published at 58 FR 60211 on November 15, 1993, in Chicago SouthShore & South Bend Railroad—Trackage Rights Exemption—Norfolk and Western Railway Company, Finance Docket No. 32392, for CSS to acquire approximately 2 miles of overhead trackage rights for access to the Port track. The trackage rights were restricted to the movement of specific commodities for Reserve Iron and Metal Company and affiliated companies (Reserve), but the restriction was removed prior to the publication of CSS's notice of exemption on February 13, 1995. Chicago SouthShore & South Bend Railroad—Trackage Rights Exemption—Norfolk and Western Railway Company, Finance Docket No. 32652 (served and published at 60 FR 4637 on Jan. 24, 1995).

authorized to provide under the restricted trackage rights in Finance Docket No. 32392, supra. Patrick W. Simmons, for and on behalf of United Transportation Union, Illinois Legislative Board (Simmons), also petitioned to reject and/or revoke the notice of exemption, and, alternatively, to impose appropriate labor protective conditions under 49 U.S.C. 11343 and 11347 for the benefit of CRL employees. CRL and Simmons also replied in opposition to CSS's petition to dismiss, but CRL subsequently withdrew its petition to revoke the notice of exemption when CSS withdrew its petition to dismiss.[3] In a separate decision, also served on February 13, 1995 (February 13 decision), the ICC denied Simmons' petition to reject and/or revoke.

Alleging new evidence, substantially changed circumstances, and material error, Simmons filed a petition to reopen the February 13 decision and renewed his request to reject and/or revoke the notice of exemption, or, in the alternative, to impose appropriate conditions to protect CRL employees. CSS filed a reply. Simmons' petition to reopen will be denied.

BACKGROUND

Originally called the Chicago Regional Port District, Port is a municipal corporation created by the State of Illinois in 1951 to develop a port terminal along Lake Michigan. Port acquired the Lake Calumet property from the city of Chicago in 1955 and constructed such port terminal facilities as warehouses, storage areas (grain elevators and storage facilities for dry and liquid cargo), 6 shipping docks, and approximately 8.7 miles of terminal track. These facilities are used by more than 100 companies, including four active rail shippers that have facilities adjacent to Port track,[4] and an unspecified number of other active rail shippers that have facilities in the port terminal adjacent to CRL track. The Port track connects shippers, located within and outside its confines, to Port's facilities connecting rail lines, and water carriers that operate through the St. Lawrence Seaway and the inland waterway that extends to New Orleans, LA, and the Gulf of Mexico.

Port has never provided rail service. Since 1982, CRL and its predecessor, LaSalle & Bureau County Railroad Company, have continuously operated a "connection switching service" within the confines of the port terminal. CRL's switching service is nonexclusive; Port retains the right to enter into operating agreements with other carriers[5] and the discretion to designate a single

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[3] CSS had argued that, under 49 U.S.C. 10907(b)(1), its operation of switching track is excepted from the prior approval requirements of 49 U.S.C. 10901. With the withdrawal of CSS's petition to dismiss, the decision in Illinois Central R. Co. Construction and Trackage, 307 I.C.C. 493 (1959), which found the Port track to be regulated and not exempt track, remains unchallenged, and, based on the evidence of record, we see no reason to question its soundness here.

[4] The four are Reserve, Continental Grain Company, Countrymark Cooperative, Inc., and Ade Corporation.

[5] CSS states that Norfolk and Western Railway Company (N&W) and occasionally Illinois (continued...)

carrier to perform maintenance and repair. Port apparently has retained CRL to perform maintenance and repair since 1982. CRL performs regularly scheduled, connection switching service within the port terminal for 16 rail carriers, which, for the most part, absorb its switching charges, and for industries located within the Port terminal and beyond.

To expand competition, Port entered into an Operating Agreement (Agreement) with CSS on September 30, 1994. The Agreement is for an initial 3-year term; it authorizes CSS to operate without limitation on all Port owned and controlled track within the confines of the terminal and reserves Port's right to contract with other carriers for the operation of Port track. As with all other carriers that operate Port track, CSS entered into a maintenance agreement acknowledging responsibility for its proportional share of track maintenance and repair costs and Port's right to designate annually which carrier is to perform the maintenance. CSS states that it does not provide, and has no intention of providing, any type of regularly scheduled or linehaul service,[6] that it has not shared, and has no intention of sharing, employees with CRL, and that the Port terminal has not been, and will not be, operated as a joint facility.

DISCUSSION AND CONCLUSIONS

Simmons does not allege that the notice of exemption contained false or misleading information or that it otherwise was void ab initio. Rather, he argues that the transaction is subject to the prior approval requirements of 49 U.S.C. 11343 and that appropriate labor protective

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[5](...continued)
Central Railroad Company operated on Port track within recent years (CSS Petition to Dismiss at 9) and that "[it] is among several carriers who have obtained, by agreement with the Port and exemption by the [ICC], the right to operate on the track of this noncarrier, in order to serve the Port's tenant industries." (CSS Reply to Petition to Reopen at 11.) The January 24, 1994 decision denying the petitions to reject and/or revoke the notice of exemption in Finance Docket No. 32392, supra, slip op. at 4, n.12, noted that Mr. Anthony G. Ianello, Executive Director of Port, stated that CRL "does not currently have a contract with the Port [and] never had an exclusive right to operate in the Port."

[6] Prior to withdrawing its petition to revoke, CRL claimed that CSS already performed linehaul operations using Port track and that it could also perform "carrier terminal switching" service, as defined in Sioux City Term. Ry. Switching, 241 I.C.C. 53, 90 (1940), because CSS's physical access to Reserve would permit it to transport shipments in single-line service from Reserve's port facilities to the Bethlehem Steel Company facility at Burns Harbor, IN, and to a mini steel mill at Indiana Harbor, IN, that was to become operational in 1995. In addition, CRL stated that N&W periodically transports trainloads of grain in linehaul service to grain shippers located adjacent to Port track in "carrier terminal switching" service. (CRL Reply to Petition to Dismiss at 12, n.6, and 17 and the attached Verified Statement of Mr. Phillip W. MacFarlane, President of CRL, at 3-4.)

conditions are mandatory under 49 U.S.C. 11347 to protect the CRL employees who may be adversely affected by increased competition within the Port terminal. Under 49 U.S.C. 10505(d), an exemption may be revoked, in whole or in part, when the application of a provision of subtitle IV of Title 49 to a person, class, or transportation is necessary to carry out the rail transportation policy of 49 U.S.C. 10101a. When, as here, an exemption has become effective, a petition to reopen and revoke may be filed under 49 CFR 1115.3(b) and must state in detail whether revocation is supported by material error, new evidence, or substantially changed circumstances. The party seeking revocation has the burden of proof and must articulate reasonable, specific concerns under the revocation criteria. Portland & Western Railroad, Inc.—Lease and Operation Exemption—Lines of Burlington Northern Railroad Company, Finance Docket No. 32766 (STB served Oct. 15, 1997, and Feb. 24, 1998.)

Simmons first argues that the trackage rights amendment in Finance Docket No. 32652, supra, which removed the restriction in Finance Docket No. 32392, constitutes a substantially changed circumstance because it was served after November 29, 1994, the date the record in the instant proceeding closed, and, as a result, was not considered in the ICC's February 13 decision. However, the evidence suggests otherwise. CRL had petitioned to reject or revoke the notice of exemption in Finance Docket No. 32392, arguing, among other things, that it was misleading because it: (1) failed to indicate that the trackage rights were restricted; (2) failed to contain a statement of purpose in the caption summary; and (3) suggested that CSS would be able to serve the Port terminal better at a time when CSS was neither serving nor authorized to serve the Port terminal. The ICC decision denying CRL's petition was served on January 24, 1995, just before the February 13 decision and notice were issued, and fully reflected that CSS's ultimate intent was to serve the port terminal without restriction.[7]

Simmons argues that the February 13 decision materially erred in allowing CSS to extend its operations over track operated by another carrier without obtaining approval under 49 U.S.C. 11343, simply because the track is owned by a noncarrier, that it constitutes a gross expansion of the noncarrier class exemption at 49 CFR 1150.31, and that rail employees will be deprived of their statutory right to labor protection under 49 U.S.C. 11347.

To demonstrate material error, Simmons submitted a verified statement to show that, since 1982, CRL has been, and under an agreement continues to be, responsible for maintaining the Port

[7] For example, the January 24 decision in Finance Docket No. 32392 contains the following statements: (1) "CSS asserts that the class exemption for trackage rights over [N&W] will permit it to access Port-owned trackage to perform industry switching on the trackage, and will thus advance competition among carriers, restore a competitive balance to the Port, and provide shippers such as Reserve with a choice of carriers and access to alternate routes," [slip op. at 3]; and (2) "CSS asserts, and we agree, that the class exemption procedures are appropriate here as they will foster competition among carriers at the Port, allow shippers at the Port a choice of carriers and routes, and minimize Federal regulatory control," [slip op. at 6].

track. The evidence had previously been submitted by CRL in reply to CSS's petition to dismiss (CRL Reply to Petition to Dismiss, Verified Statement of Mr. MacFarlane at 4), but Simmons argues that it is new evidence because CRL subsequently withdrew as an active participant in the proceeding. Additionally, Simmons asserts that the new evidence is based on his discussions with affected UTU personnel and his own investigation.

Simmons argues that 49 U.S.C. 10901 distinguishes between operating and providing transportation over a line. Further he contends that the noncarrier class exemption applies only to noncarriers who seek both to acquire and operate rail lines that belong to existing carriers and that it can neither be bifurcated into separate acquisition and operation exemptions nor applied to allow a carrier to acquire and/or operate a rail line being operated by another carrier simply because "the line is 'owned' by a noncarrier." Thus, Simmons claims that CSS is not entitled to use the noncarrier class exemption because it does not seek to acquire and operate the line and, in the alternative, because it seeks to operate over, and not operate, the line. In his view, CRL is the only carrier that operates the line because it "performs operations on the line . . . . [and] the maintenance," whereas CSS only performs operations over the line.

Contrary to Simmons' arguments, 49 U.S.C. 10901(a) does not require both the acquisition and operation of a line. While section 10901(a)(4) applies to transactions "to provide transportation over, or by means of an extended or additional railroad line," section 10901(a)(3) applies broadly to rail carriers that seek to " (3) acquire or operate an extended or additional railroad line." Moreover, it is apparent that the noncarrier class exemption was intended to apply, and numerous decisions reflect that it has been applied, to acquisition and/or operation transactions. Indeed, in the decision adopting the noncarrier class exemption, the ICC observed, in discussing the scope of section 10901, that "Noncarriers require Commission approval under section 10901 to acquire or operate a rail line in interstate commerce. Existing carriers require approval under section 10901 to acquire or operate a line owned by a noncarrier. . . . (Emphasis added)" Class Exemption—Acq. & Oper. of R. Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810 (1986) (Class Exemption), aff'd mem. sub nom. Illinois Commerce Com'n v. I.C.C., 817 F.2d 145 (D.C. Cir. 1987).[8] Even in the caption summary that must accompany applications for exemptions from section 10901, 49 CFR 1150.34 requires that applicants specify, among other things, "The type of transaction, e.g., to acquire, operate or both." Class Exemption, supra, at 821.

We also disagree with Simmons' argument that CSS is not entitled to use the noncarrier class exemption because it does not "operate" the Port track. The unrebutted evidence of record establishes that Port has entered into similar nonexclusive operating agreements and that CSS entered into such a nonexclusive agreement to operate, and is operating, the Port track in the same manner as CRL or any other carrier under contract with Port. Simmons' reliance on CRL's past and

[8] In the February 13 decision, at 3, the ICC noted that its "regulations at 49 CFR 1150.1(a) specifically state that 49 U.S.C. 10901 applies when an existing carrier seeks to operate a line owned by a noncarrier."

continuing responsibility to maintain the Port track is misplaced. As already noted, the maintenance and operation responsibilities have been separated; maintenance is contracted out to a single carrier of Port's choice and may be reassigned annually whereas operating rights are contracted out to various carriers, and they must share the maintenance cost. Thus, there is no meaningful distinction between operating and operating over.

Next, Simmons argues that CSS's operation of Port track comes literally under the terms of 49 U.S.C. 11343(a)(6)[9] because it involves the joint use of a rail line operated by another carrier. He acknowledges that Port is not a carrier but emphasizes that the Port track already is being operated by a carrier and observes that Port "nevertheless has a potential obligation to become a carrier upon default of either CRL or CSS." This argument lacks merit as well.

Joint use arrangements for the most part have involved the sharing of terminal track and facilities. To the extent regulated track was involved, carriers could enter into these joint arrangements (and establish compensation) only if prior ICC approval was obtained under former section 5(2)(a)(ii) of the Interstate Commerce Act (Act).[10] Otherwise, under former sections 1(18)-(21) of the Act, carriers could voluntarily enter into joint use arrangements without obtaining prior ICC approval, to the extent unregulated track and facilities were involved, but, as particularly relevant here, prior approval was necessary for a carrier to operate track and facilities owned by a noncarrier, regardless of whether the track and facilities were being operated by other carriers. Operation by Manufacturers Ry. Co., 145 I.C.C. 715 (1928) (Manufacturers).[11]

A review of the case law since Manufacturers establishes that 49 U.S.C. 11343 and its predecessors have been applied consistently and exclusively to transactions involving either a "consolidation of carrier interests, or a joining of two or more carriers, with a consequent temporization of competition." Okmulgee Northern Ry. Co. Abandonment, 320 I.C.C. 637, 639

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[9] Prior approval is required under 49 U.S.C. 11343(a)(6) for the "acquisition by a rail carrier of trackage rights over, or joint ownership in or joint use of, a railroad line (and terminals incidental to it) owned or operated by another rail carrier."

[10] The Transportation Act of 1920, Pub. L. No. 66-152 section 305, 41 Stat. 456, 479, extended the ICC's authority under former section 3(5) of the Act to empower it to require joint use arrangements, if found to be in the public interest and practicable, and to prescribe the compensation, if necessary. Prior to that time, the ICC could not require a joint use arrangement without a showing of a compelling interest.

[11] In Manufacturers, a rail carrier was granted authority under sections 1(18)-(21) of the Act to operate over a bridge and track owned by the City of St. Louis, MO, a noncarrier. St. Louis had leased the track, which formed part of its municipally owned railroad, to another carrier to operate, but retained and was exercising the right to bring in other carriers to ensure competition. The ICC summarily denied the lessee protestant's contention that section 3(4), and not section 1(18), of the Act applied. 145 I.C.C. at 723.

(1964). In United Transportation Union v. Burlington Northern Company and Houston Belt & Terminal Railway, No. 40074 (ICC served Mar. 25, 1987), slip op. at 2-4, the ICC observed that 49 U.S.C. 10901 and its predecessors are directed at the transportation oriented activities of single rail carrier and noncarrier applicants, where there is little danger of adverse competitive consequences, whereas the focus of section 11343 is on the potential anticompetitive impact of multi-carrier transactions.

The courts uniformly and repeatedly have affirmed ICC decisions finding that 49 U.S.C. 11343 is concerned only with transactions that involve two or more rail carrier participants.[12] Joint use arrangements under section 11343(a)(6) are no exception. They must involve an agreement by at least two carriers to share track and/or facilities.[13] Thus, CSS's operation of the Port track could not constitute a joint use of a line operated by another carrier because no other carrier was involved as a party to either the arrangement or the agreement. Even more on point, in ruling on a prior challenge to the adoption of the noncarrier class exemption, the court in Simmons v. I.C.C., 829 F.2d 150, 157 (D.C. Cir. 1987), affirmed the ICC's express declaration that 49 U.S.C. 10901 extends to the acquisition by existing rail carriers of rail lines owned by noncarriers, regardless of whether the lines are being operated by other carriers.[14]

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[12] See People of State of Ill. v. United States, 604 F.2d 519, 524-26 (7th Cir. 1979), cert. denied, 455 U.S. 951 (1980); Matter of Chicago, M., St. P. & Pac. R. Co., 658 F.2d 1149, 1169 (7th Cir. 1981), cert. denied, 455 U.S. 1000 (1982); Railway Labor Executives' Ass'n v. United States, 697 F.2d 285, 286 (10th Cir. 1983); and Black v. I.C.C., 762 F.2d 106, 110-11 (D.C. Cir. 1985) (Black). In Black, at 115, n.17, the court observed that 49 U.S.C. 11343 is "plainly concerned . . . with transactions integrating two or more carriers and with the effect of multi-carrier transactions on competition" but recognized that section 11343 also includes two specific categories of noncarrier acquisitions [section 11343(a)(4) and (5)] and, as to each, it emphasized that "at least two carriers are nonetheless 'involved.'"

[13] In Chicago, Missouri & Western Railway Company—Exemption Acquisition and Operation—Illinois Gulf Railroad Company, Finance Docket No. 30911 et al. (ICC served Dec. 21, 1986), Simmons argued, among other things, that an agreement was subject to 49 U.S.C. 11343(a)(6), and not 49 U.S.C. 10901, because it involved a joint use of a line by two carriers. The ICC found otherwise; it concluded that the agreement did not require "approval under section 11343(a)(6) as a joint carrier use of a rail line . . . . simply because [one of the parties] is not a carrier and therefore an agreement between carriers for joint use of a rail line is not involved." Slip op. at 5.

[14] Simmons characterized the ICC's statement, that 49 U.S.C. 11343 applies only to acquisitions where both buyer and seller are carriers, as a "novel theory," and, as here, attacked the noncarrier class exemption as an impermissible self-expansion of power under 49 U.S.C. 10901 and an undue diminution of the labor protection available to the employees of acquired lines. The D.C. Circuit disagreed, as follows:

(continued...)

Finally, the ICC declined to impose labor protection under 49 U.S.C. 11347 for CRL's employees because CRL was not directly involved in the transaction and, in the alternative, because CSS and CRL were not sharing employees so as to come under the joint employee exception. Simmons does not challenge the ICC's refusal to apply the joint employee exception. Instead, he contends that CRL is directly involved in, and a necessary party to the transaction, even if it was not a party to the actual CSS-Port agreement, because the Port track could not be operated without the maintenance CRL performs as the operator. Additionally, he argues that a carrier's direct involvement in a transaction "does not go to liability for employee protection under 49 U.S.C. 11343, but to discretionary protection under 49 U.S.C. 10901, an issue [we] need not reach if the arrangement is considered under 49 U.S.C. 11343(a)(6)."

In numerous decisions, the ICC and the courts consistently have ruled that the employees of a non-applicant carrier or a carrier not directly involved in a transaction governed by 49 U.S.C. 11343 are not entitled to labor protection under 49 U.S.C. 11347.[15] Simmons argues that CRL is directly involved and a necessary party, but the evidence demonstrates otherwise. CRL's status, as an operator of Port track, is no different from the status of CSS or any other carrier with similar authority, notwithstanding that CRL was also responsible for maintenance. CRL may be affected by the transaction, but it is neither involved nor a necessary party. Accordingly, based on the evidence of record, the ICC correctly concluded that the transaction was subject to 49 U.S.C. 10901 and the noncarrier class exemption and not to 49 U.S.C. 11343(a)(6) and the mandatory labor protection requirements of 11347.

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[14](...continued)
After careful consideration, the Commission concluded that such transactions would generally only implicate the property and operations of a single carrier, and accordingly declared that they were more properly treated under Section 10901. We find that conclusion in accord with the spirit of Sections 10901and 11343, and we thus affirm the Commission. [Simmons, 829 F.2d at 157.]

[15] In Kansas City Southern Industries, Inc., The Kansas City Southern Railway Company and K&M Newco, Inc.—Control—MidSouth Corporation, MidSouth Rail Corporation, MidLouisiana Rail Corporation, SouthRail Corporation and TennRail Corporation, Finance Docket No. 32167 (ICC served Nov. 8, 1994), the ICC noted that Simmons had previously argued and lost on this issue in Crounse Corp. v. I.C.C., 781 F.2d 1176, 1192-93 (6th Cir. 1986), cert. denied, 479 U.S. 890 (1986), and that arguments for inclusion under 49 U.S.C. 11347 had also been rejected in such other cases as Missouri-Kansas-Texas R. Co. v. United States, 632 F.2d 392, 410-12 (5th Cir. 1980), cert. denied, 451 U.S. 1017 (1981); Lamoille Valley R. Co. v. I.C.C., 711 F.2d 295, 323-24 (D.C. Cir. 1983); Southern Pacific Transp. Co. v. I.C.C., 736 F.2d 708, 725 (D.C. Cir. 1984), cert. denied, 469 U.S. 1208 (1985); and Railway Labor Executives' Ass'n v. I.C.C., 914 F.2d 276, 280-81 (D.C. Cir. 1990) ("the ICC's interpretation of 'involved' to mean only those who formally participate as parties to a transaction is reasonable.").

We note that, under ICCTA, this issue could not have arisen, even if 49 U.S.C. 11323 (formerly 49 U.S.C. 11343) were found applicable to the transaction, because CSS and CRL are Class III carriers, and under current 49 U.S.C. 11326, labor protection may not be imposed on transactions where the only carriers involved are Class III carriers. If a court were to find our analysis in this decision flawed and remand the matter to the Board, the agency would be required to apply the provisions of ICCTA and, as a consequence, neither employees of CSS nor employees of CRL would be entitled to protection.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Simmons' petition to reopen and revoke is denied.

2. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary